IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2022] NZACC 96 ACR 90/17

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ANDREA McGREGOR Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 29 April 2022
Heard at: Christchurch/ Ōtautahi

Appearances: Appellant in person
Mr C Light for the Respondent

Judgment: 19 May 2022

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Whether appellant has achieved vocational independence]

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[1] On 7 March 2016, ACC issued a decision in which it concluded that Mrs McGregor had achieved vocational independence in the following work types namely:

a. Community worker;
b. Out of hours care worker;
c. General clerk;
d. Human resources clerk; and
e. Receptionist (general).

[2] At review, ACC's decision was modified, deleting the work type "out of hours care worker", because it was conceded at the review hearing, on behalf of ACC, that this was a part time position.

[3] The issue for determination is therefore whether ACC's decision of 7 March 2016 in respect of the remaining four work types is correct.

Background

[4] The appellant has cover for concussion and a left ankle sprain suffered on 10 July 2002. She was at that time working as an ACC case manager. She continued to work for ACC.

[5] She also has cover for contusions to the left knee, left elbow/forearm and left wrist from an accident in 2003 when she fell onto her outstretched left hand. She also has cover for right wrist sprains caused by accidents on 16 June 2005 and 11 February 2006.

[6] ACC terminated her employment in February 2006 because of performance issues and she began receiving weekly compensation for the 11 February 2006 right wrist injury.

[7] On 1 December 2015, the appellant signed an ACC individual rehabilitation plan which outlined the steps to assist her recovery as agreed to between her and her case manager.

[8] On 18 December 2015, ACC wrote the appellant to advise her that her individual rehabilitation programme was now complete and that her vocational independence would be assessed.

[9] On 14 January 2016, Dr Craig Gribble completed a vocational independence occupational assessment report. He noted that the appellant had pre-incapacity annual earnings as an ACC case manager of $57,705.33 per annum.

[10] Dr Gribble referred to the appellant's employment history of approximately 41 years in a number of different roles. The appellant's qualifications included a Bachelor of Science degree with a psychology major, a Postgraduate Diploma in Rehabilitations Studies and a partially completed Masters in Health Science (Rehabilitation).

[11] The report identified ten work types that were suitable for the appellant taking into account her skills, qualifications and training, her pre-incapacity earnings and the rehabilitation she had undertaken. Dr Gribble's ten job recommendations were:

a. Drug and alcohol counsellor;
b. Rehabilitation counsellor;
c. Community worker;
d. Case worker;
e. Special interest organisation administrator;
f. Recruitment consultant;
g. Out of school hours care worker;
h. General clerk;
i. Human resources clerk; and
j. General receptionist.

[12] The report notes a favourable comment from the appellant in respect of each job type except that of receptionist (general) where the appellant commented "not so much".

[13] On 19 February 2016, Dr Antoniadis, specialist occupational physician completed a complex vocational independence medical assessment.

[14] Under the hearing "Opinion", Dr Antoniadis stated:

> Ms McGregor is a 60-year-old, right hand dominant woman who (was) employed as a case manager with ACC in Christchurch when she fell on her driveway in 2002 …
>
> The incident of 10 July 2002 was deemed to be a slip and fall on an icy driveway where she sustained what appears to have been a presumed traumatic brain injury and also injury to her left wrist…
>
> In 2006, she fell on both hands while kicking a soccer ball aggravating her right wrist symptoms.

> She has persistent pain associated with her right upper extremity and also symptoms suggestive of a post concussive syndrome. These were discussed at great length and detailed by a number of medical specialists including neurologists, neurosurgeons and orthopaedic surgeons.
>
> She underwent no surgical procedure other than in relation to her upper extremity.
>
> She has had a multi-disciplinary approach managing her persisting presumed post-concussion symptoms particularly those of fatigue and including the symptoms she described with regards concentration for example.
>
> Her most recent neuropsychological assessment by Dr James Webb confirmed persistence of some subtle cognitive limitations deemed to be post-concussive neurologine. It is clear that there is a history of significant psycho social issues which at times have resulted in a significant deterioration in the mood.
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> …
>
> She has a good understanding of self-management of her residual cognitive and physical limitations.
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> …
>
> She does have some limitation in my opinion in regards her cognition particularly associated with fatigue and I would suggest she would be best able to manage the ongoing and persisting fatigue symptoms in roles that are not of higher cognitive demand.
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> Physically she is limited in regards future employment and this is more in relation to her multiple musculoskeletal complaints. I would suggest roles that require more moderate to heavy lifting, pushing, pulling or carrying would prove difficult for her left and right wrists and also with regards her ankle. Similarly sustained a prolonged periods of standing and walking without frequent sitting would also prove difficult for her and particularly on a full time basis.
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> …
>
> In my opinion she is entirely suited to return to full time employment albeit she wishes to return to work 20 hours per week as well as filling in extra hours every so often.
>
> In my opinion, she is entirely suited (to) physically demanding roles that are of sedentary to light occasional medium physical demand.
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> She is suited to roles that require occasional stretching and reaching, occasional squatting and crouching. In my opinion, she will not likely sustain roles that demand high levels of cognitive demand but can undertake and sustain lessor cognitively demanding activity.

[15] Dr Antoniadis concluded that four work types were not sustainable because of the higher cognitive requirements of these work types. However, he concluded that the five work types, as listed at the beginning of this Judgment, were sustainable. In

respect of the out of hours care worker role, he noted that the appellant stated that she could work 15 hours per week but acknowledged that this was not a full time option.

[16] On 7 March 2016, ACC wrote to Mrs McGregor to advise her that she had been assessed as having vocational independence in the five listed work types.

[17] Although Dr Antoniadis had included a role of case worker, this being similar to her role with ACC, this was omitted from ACC's decision letter of 7 March 2016 because it was in fact the same work type as her pre-injury role of ACC case manager. Also, the appellant told Dr Antoniadis that she disagreed that this job type was suitable and sustainable and felt that it would require higher cognitive requirements. She did concede that she could be interested in this role if it were with the Ministry of Social Development or WINZ.

[18] At the request of the appellant's advocate, Vocational Consultant, Stuart Macann, provided a report dated 17 October 2016 in support of her application for review.

[19] Mr Macann considered that none of the work types were suitable.

[20] Mr Macann was generally critical of Dr Gribble's vocational independence occupational assessment report in that the length of Dr Gribble's consultation was not sufficient for a "thorough job". The appellant was late for her appointment and the appellant says it was a 30-minute meeting. Dr Gribble on the other hand acknowledges that the meeting scheduled for 11 am began at 11.25 am and lasted for approximately an hour.

[21] Mr Macann also noted a significant income disparity between the appellant's pre-injury income (of approximately $57,000) and the identified job types, each of which commenced at $30,000 and, at most, reached $55,000.

[22] Mr Macann also noted the need for modifications to a standard workstation to enable the appellant to function safely.

[23] In respect of the community worker role, he noted that the appellant had not worked in the field before and it would be expected that a potential employee would be well connected in the community and understand the pathways to additional help and services. He also said that generally, three hours driving was required for a community worker in Christchurch each day, when the Occupational Therapist's report says that the appellant should not drive for more than two hours per day.

[24] In relation to the work type of general clerk, Mr Macann said that this job title did not exist in the job market. He was therefore unable to find accurate information on the job title. He says the job should be excluded from the vocational independence occupational assessment decision on the basis that it no longer exists. Mr Macann made similar comments in respect of the human resources clerk work type.

[25] In relation to the work type of Receptionist, Mr Macann said that the appellant had no experience as such, and it could not therefore be confirmed she had the ability to do the job.

[26] In the light of Mr Macann's report, ACC sought comment from Steve Berry of Aspect Consultants Limited. Mr Berry was critical of Mr Macann's comments about earnings data. He said that the earnings ranges that Mr Macann had quoted were very narrow and did not reflect the typical salary bands seen in the job market.

[27] Mr Berry also noted that Dr Gribble had ruled out some 40 occupations that had previously been recommended for the appellant.

[28] In respect of the work type of Community Worker. Mr Berry acknowledged that driving was occasional to frequent and that while some roles might require driving for three hours a day, others might require less.

[29] Mr Berry disagreed with Mr Macann's opinion that the general clerk work type no longer existed. He said that the occupation may be advertised under numerous different job titles but that was a matter of semantics. Mr Berry made a similar comment in respect of the work type of human resources clerk.

[30] As to the work type of Receptionist, Mr Berry noted that the appellant had worked as Veterinary Nurse in receptionist for five years.

[31] Mr Berry also explained that the "next working day rule" was a guide for occupation assessors. It simply meant that the claimant should be able to begin work in the recommended job on the next working day because the claimant was vocationally ready in terms of skills training qualifications licences etc.

[32] On 5 December 2016, Mr Macann provided a response to Mr Berry's report. In essence, he stood by what he had said in his assessment of 17 October 2016.

[33] ACC's decision went before reviewer Lindsay Edmondson on 21 February 2017. In a decision dated 20 March 2017, the reviewer dismissed the application. The reviewer did however modify ACC's decision to eliminate the work type of out of hours care worker because it did not allow for full time work.

[34] Dr Ryder-Lewis, Occupational Physician, provided a report dated 19 February 2019 at the request of the appellant's advocate. Under the heading "Opinion" is this:

> Although Ms McGregor's medical history is complicated, in my opinion, her current limitations are substantially the result of the TBI in 2002 and to a lessor extent the result of her various musculoskeletal injuries. I note the neuropsychologist was unsure whether Ms McGregor would be able to work full time and was of the opinion her cognitive slowing as a result of the TBI was likely to lead to more fatigue. I note also Mr Finnis, Neurosurgeon, was of the opinion Ms McGregor's limitations was a result of her TBI. Her day to day activity is sheltered. She frequently needs to rest and sleep during the day. Her symptoms include fatigue, headaches, visual disturbance, and difficulty with concentration. She has a limited tolerance for sitting, standing or walking. Although not all of her musculoskeletal symptoms are accident related or covered by ACC, it is difficult to determine with precision how much each injury can trigger to these limitations. However, I am confident that her covered injuries are a factor in her limited work capacity. Her attempts to work full time as an alcohol and drug counsellor and ACC case manager were unsuccessful. I believe it is unlikely for the (sic) rehabilitation will significantly improve Ms McGregor's work fitness.

[35] Dr Ryder Lewis concluded that all of the work types for which the reviewer had concluded that the appellant had vocational independence were not sustainable.

[36] The appellant, on 3 November 2021, tabled a report from Sam Young, Careers Guidance Practitioner, dated 10 August 2017, to contest the availability of the roles of General Clerk and Human Resources Clerk and whether these roles existed in the New Zealand market. Ms Young further stated that the appellant did not have qualifications to do these work types.

[37] As to the Receptionist work type, Ms Young's opinion was that the appellant did not have sufficient experience for this work type and that her age would be a significant barrier to employment.

[38] Ms Young also noted that the role was paying significantly less than her previous work as a case manager and that this was also so with the Community Worker work type. Ms Young also questioned whether the appellant had the requisite skills and experience for the Community Worker work type.

[39] ACC obtained comment from Mr Berry on Ms Young's report. Mr Berry said that the ANZSCO database was reviewed in 2021 and the work types of General Clerk and Human Resources Clerk were retained. Mr Berry said the ANZSCO database was prepared by the Australian Bureau of Statistics and Statistics New Zealand, two specialist bodies. Mr Berry disagreed that the appellant did not have the experience to do these work types and gave reasons.

[40] As to the Receptionist work type, Mr Berry referred to the work type details sheet as stating that for entry level positions, on the job training is sufficient. He noted that the appellant had experience as a receptionist and had transferable skills and experience that would make her a sought-after candidate.

Appellant's submissions

[41] Ms McGregor read her prepared submissions to the Court. She described the accident that concussed her and left her with a left ankle sprain on 10 July 2002. She described a number of examples of the effect of her concussion and injury. She also described a less than supportive environment in the workplace with ACC.

[42] She said that although she continued to work for ACC and that this was often used as "proof" that she was capable of working full time, everything had changed. Prior to her injury, she had 160 files and this dropped to 60 and she was not managing. She said she went from "exceptional" in her performance reviews to "failing" even with less files. She said:

> I was not fulfilling my role as case manager at ACC by any means and I was not passing my performance reviews.

[43] She submits that for a correct vocational independence occupational assessment, ACC should have indicated to the assessor the results of her performance reviews. Instead, the assessors were informed that she had "successfully remained at work".

[44] She described how she slept excessively and that she slept most of the weekends. She said she did not do much housework or cook or do her garden.

[45] She told the Court that she eventually lost her job with ACC, although this was not for a performance related reason.

[46] She said the search for work began again as soon as she left ACC and Care NZ eventually offered her paid work doing some shifts.

[47] She told the Court she left Care NZ when there was a change of managers. The new managers wanted her to work a different way and that they were of the opinion that you did the job as instructed or consider leaving. She said she began to have panic attacks again and being upset because she could not cope with the new way her managers required that she work.

[48] She told the Court that due to not being able to find other work, she commenced doing domestic cleaning. She said:

> I live alone and now retired, and I still find I have to plan my day correctly or I end up falling asleep in inappropriate places. Shopping, social events, family excursions all have to be carefully planned. I still try not to drive at night or when tired as per recommendations of driving instructor. I am not working now but I have the same basic problems I had when working for ACC … I object to

> assessors and ACC saying that psychosocial aspects of my life caused my ongoing difficulties.

[49] She refers to the vocational independence occupational assessment which was completed in under an hour on account of her lateness and says that the 60 minutes is the required time frame.

[50] She says the assessor is in error in saying that:

> Mrs McGregor advised that no equipment had being specified.

[51] She says that at ACC a number of items helped her with typing, seating mouse work and screen height.

[52] She does not consider that she could commence work in any of the positions listed "tomorrow" even with job training and especially without needed equipment.

[53] She said that support workers are required to have mental health certificates at very least and although she has a Psychology degree, she would need more current training. Limitations on her driving times and lack of knowledge about current community systems and assistance available are also obstacles.

[54] She told the Court she made an application for an activities assisted worker but was unsuccessful because she was unable to drive the rest home van on account of its manual transmission and because the rest homes insurance company would not cover her for driving because of her visual attention defects and wrist elbow injuries.

[55] She does not feel that the position of receptionist would be suitable on account of her age, appearance, deafness and self-consciousness.

[56] She says the position of clerk seems redundant and that it appears to be a coverall term for many positions. She says that most of these positions require more expertise on the computer than she had.

[57] She says that for all the positions the income would be far less than she was receiving as case manager.

[58] She submitted that the vocational independence medical assessment glossed over a number of matters. She says Bay Audiology assessed her as having hearing of 2/10 on a 1 – 10 scale and that this is a substantial hearing loss which will impact any employment. She says her elbows are not moving "normal and symmetrical". Her left elbow is permanently bent at an angle from the fracture.

[59] She points out that the assessment noted "no joint effusion but some mild medial joint line tenderness in her left knee". She says that in fact, a total knee replacement was completed in hospital last year.

[60] She notes that Dr Antoniadis notes that roles that require shift work are not suitable whereas her enquiries relating to community support work role have shown that clients are often seen in the evenings and on the weekends.

Respondent's submissions

[61] Mr Light submits that in respect of a number of work types, Mr Macann and Ms Young treat a lack of experience in a job as determinative. Mr Light submits that the Act specifically recognises that skills, training and experience are relevant considerations, but it is not a legal requirement that a person must have experience in the work type for it to be suitable. He refers to *Rowan v Accident Compensation Corporati*on.[1]

[62] Mr Light submits that the opinions of Dr Gribble and Mr Berry should be preferred over that of Mr Macann and Ms Young in respect of the suitability of the work types.

[63] In respect of the community worker work type, he notes that Mr Macann is of the opinion that the appellant would not be employed. However, Mr Macann does not explain why the appellant's experience, skills and training does not sufficiently equip her to undertake this work type or how Dr Gribble's assessment was wrong in this regard.

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1 *Rowan v Accident Compensation Corporati*on [2012] NZACC 22 at [32].

[64] He notes that the appellant has Bachelor of Science degree as well as Postgraduate Diplomas and she therefore would easily meet the qualification criteria for this work type.

[65] In respect of the work types of general clerk and human resources clerk, Mr Light does not accept the broad proposition that the jobs do not exist. He says that advertise job titles may defer from the name of the work type in the ANZSCO classification but that is a matter of semantics. He says there can be no doubt that the appellant has administrative and clerical experience having worked as an ACC case manager and the legal executive amongst other occupations.

[66] As far as the receptionist role is concerned, Mr Light submits that experience of a particular work type is not a legal requirement. Rather the legal test for vocational independence is whether the claimant is suited by reason of her experience, educational training to work in this work type. Dr Gribble's opinion was that this work type was suitable because she had worked as receptionist and had a number of relevant skills for this work type. Mr Berry was of a similar view.

[67] He notes that Ms Young refers to a number of workplace modifications needed. Mr Light submits that as the appellant continued to work for ACC after her injury with the ordinary equipment, one finds in a modern workplace.

[68] He notes that neither Dr Gribble nor Dr Antoniadis identified any modifications that were needed so that she could do her work safely.

[69] As to income disparity, Mr Light reminds the Court that there is no requirement in the Act that a work type is only suitable if earnings from that work type are at least equivalent to the claimant's pre-incapacity earnings.

[70] Mr Light refers to clause 25(1)A of schedule 1 which provides that when the occupational assessor is considering the suitability of a work type, the assessor may take into account amongst other things the claimant's earnings before incapacity. Pre-incapacity earnings is therefore only one possible factor in considering the suitability of a work type.

[71] Mr Light points out that in 2010, Parliament elected to replace the word "must" with the word "may". He says the meaning and effect to be given to this amendment must be ascertained from its text and in the light of its purpose. He says it follows that an exact financial comparison between the proposed work type and the pre-incapacity earnings is not required.

[72] He refers to what Judge Ongley said in *Kemp v Accident Compensation Corporation*:[2]

> …The objective is not to match income, but to find job types that correspond broadly with the claimant's experience, education, or training. The designated types of employment should be of commensurate worth, but the legislation stops short of prescribing a similar earning potential.

[73] Mr Light acknowledges that in this case, all of the work types proposed by Dr Gribble as suitable have at the bottom end of the range earnings that are well short of what Mrs McGregor was receiving for her pre-incapacity earnings as an ACC case manager. However, the upper end of the range of $50,000 for these work types is quite close to Mrs McGregor's pre-incapacity earnings of $57,705.

[74] He submits it is more likely that because of Mrs McGregor's qualifications, overall skill set and general work experience that she would fall into the high end of the band for the identified work types.

[75] Mr Light is critical of the reports of Mr Macann and Ms Young saying they reflect a lack of balance and each of them appears to have assumed the role of an advocate for the appellant.

[76] As to the medical assessment regarding the suitability of work types, Mr Light notes that Dr Antoniadis considered four of those work types were not sustainable because of the higher cognitive requirements of those work types. He submits that this reflects a considered and balanced approach that takes into account the appellant's limitations. He says the assessment by Dr Antoniadis is made despite the fact that Mrs McGregor had in fact worked as an ACC case manager until 2006 and

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2 *Kemp v Accident Compensation Corporation* [2010] NZACC 132 at [39].

he notes that particular work type would have been of far greater cognitive demand than the four work types now in issue.

[77] Mr Light submits that there is an air of unreality in Dr Ryder-Lewis' wholesale rejection of all the work types.

[78] He submits:

> The picture painted by Dr Ryder-Lewis of Mrs McGregor's functional ability at the date of the assessment is at odds with the other more contemporaneous medical reports on the file that concluded that Mrs McGregor did have capacity to work full time, such as reports of Dr Hilliard and Dr Webb. Dr Webb's opinion in this respect should carry considerable weight because he is a neuropsychologist and therefore his expertise in the relevant field of the consequences of a traumatic brain injury and the likely cognitive impairments suffered by Mrs McGregor. As Dr Webb noted in his report, Mrs McGregor was able to work full time after the accident event in 2002. He thought very tentatively by using the word "might", that she may not be capable of working 40 hours per week in a cognitively demanding work role but agreed with Dr Hilliard that she would be capable of working 30 hours or more per week.

[79] Mr Light also notes that Dr Ryder-Lewis' assessment of the appellant's physical sustainability for these work types is at odds with Dr Antoniadis' assessment. He says the difference can be explained by the fact Dr Ryder-Lewis' assessment took place three years after Dr Antoniadis' assessment and that the appellant's physical and cognitive abilities may have deteriorated in the interim period.

[80] Mr Light says that the case law is clear in this respect that the vocational independence assessment is a snapshot in time. If Mrs McGregor's vocational independence has deteriorated, then she can apply for a reassessment under s 109.

[81] Mr Light is also critical of the fact that in Dr Ryder-Lewis' examination of the requirements of the work types, he has not given reason for his conclusions that these work types are not suitable for Mrs McGregor. He simply says she would "struggle" with working in the work types on a full-time basis.

Decision

[82] The issue in this case is whether ACC's decision of 7 March 2016 concluding that the appellant had achieved vocational independence in the work types of Community Worker; General Clerk; Human Resources Clerk; and Receptionist, is correct. The decision subject of this appeal therefore is just over six years old.

[83] As Justice Ronald Young said in *Nelson*,[3] the Court's jurisdiction is to determine the correctness or otherwise of decisions made by ACC at the date of the decision. In this case, the two reports primarily relied upon by ACC are the vocational independence occupational assessment report of Dr Gribble dated 14 January 2016 and the complex vocational independence medical assessment of Dr Antoniadis dated 19 February 2016.

[84] It is noted that vocational independence is defined in s 6 of the Act as meaning:

> …the claimant's capacity, as determined under section 107, to engage in work-
>
> (a) For which he or she is suited by reason of experience, education, or training, or any combination of those things; and
>
> (b) For 30 hours or more a week

[85] Dr Gribble's report runs to 28 pages. Amongst other things it summarises the appellant's 41-year work history and it ultimately identifies some 10 job recommendations.

[86] Then follows the complex vocational independence medical assessment of Dr Antoniadis dated 19 February 2016.

[87] Dr Antoniadis includes the following under the heading "Opinion":

> Her most recent neuropsychological assessment by Dr James Webb confirmed persistence of some subtle cognitive limitations deemed to be post concussive in origin. It is clear that there is a history of significant psychosocial issues which at times have resulted in significant deterioration in mood.
>
> …

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3 *Nelson v Accident Compensation Corporation* [2008] 19 PRNZ 108 at [25].

> She has a good understanding of self-management of her residual cognitive and physical limitations. She is aware of the fatigue and manages this by trying to live a normal life. She sustains a longer period of sleeping hour to accommodate what appears to be residual neurofatigue.
>
> …She does have some limitations in my opinion with regards her cognition, particularly associated with fatigue and I would suggest that she would be best able to manage the ongoing and persisting fatigue symptoms in roles that are not of higher cognitive demand.
>
> Physically, she is limited in regards future employment and this is more in relation to her multiple musculoskeletal complaints. I would suggest that roles that require more moderate to heavy lifting, pushing, pulling or carrying would prove difficult for her left and right wrists and also with regards her ankle. Similarly, sustained and prolonged periods of standing and walking without frequent sitting would also prove difficult for her and particularly on a full time basis.
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> …
>
> I would suggest prolonged periods of driving which requires sustained and prolonged periods of concentration would be compromised by the residual symptoms of described fatigue.
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> Ms McGregor is not suited to roles that require shift work activity because of the sleep disturbance and likely worsening sleep patterns and potential worsening of her fatigue.
>
> …
>
> Her hearing may continue to be impaired. I would deem it would be likely difficult for her to maintain a role that required frequent or significant telephone-based activity.
>
> In my opinion, she is entirely suited to return to full time employment albeit she wishes to return to work 20 hours per week as well as filling in extra hours every so often.
>
> In my opinion, she is entirely suited physically demanding (sic) roles that are of sedentary to light or occasional medium physical demand.

[88] In context, there appears to be an error and that for "demanding" read "undemanding".

[89] Dr Antoniadis then says:

> She is suited to roles that require occasional stretching and reaching, occasional squatting and crouching. In my opinion, she would be unlikely to sustain roles that demand high levels of cognitive demand but can undertake and sustain less cognitively demanding activity.

[90] There is criticism by the appellant of the fact that because of her lateness for the appointment the vocational independence occupational assessment was rushed. I find no evidence of that. Dr Gribble says that it lasted approximately 60 minutes. Furthermore, the fact that the vocational independence medical assessment followed the occupational assessment results in a more concise focus on the appellant's health and injury status and how that might impact on the suggested job titles.

[91] It follows from what I have specifically referred to above from Dr Antoniadis' assessment that proper consideration has been given to the appellant's suitability for employment from a medical perspective. The assessment significantly reduced the number of suitable job titles as is more often than not the case.

[92] In *Martin*,[4] Justice Ronald Young summarised the principles applicable to a review or appeal in respect of a vocational independence decision as follows:

> [36] In summary, therefore:
>
> a) when assessing vocational independence by the Corporation the *Ramsay* principles apply [is there cogent evidence that there was a material flaw in the medical assessment];
>
> b) the review and any appeal to the District Court are to be determined according to the statutory review and appeal rights, *Wildbore* and *Austin Nichols*. The *Ramsay* principles have no application to such reviews or appeals to the District Court;
>
> c) the approach in (b) therefore requires the reviewer or District Court to consider all the relevant evidence and to decide if they are satisfied the claimant is vocationally independent. The medical assessor's opinion is to be given no pre-eminence solely because of its statutory basis;
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> d) if the reviewer or District Court reach a different conclusion on the evidence as to vocational independence than the Corporation (or reviewer) then the decision is wrong, the obligation on the appellant met and a different decision should be substituted;
>
> e) in assessing expert medical evidence factors such as (non-exhaustive) the extent and relevance of the practitioners qualifications and experience, the comprehensiveness of the evidence gathered, the quality of the report, where the preponderance of opinion lies and the validity of criticism of

[4] *Martin v Accident Compensation Corporation* [2009] 3 NZLR 701 at [36].

> other medical opinions, will all be relevant in deciding the ultimate question.

[93] In regard to the last factor I find the evidence of Mr Macann and Ms Young on behalf of the respondent, wanting.

[94] In respect of the work type of Community Worker, as Mr Light points out, Mr Macann does not explain why Mrs McGregor's experience, skills and training does not sufficiently equip her to undertake this work type or how Dr Gribble's assessment was wrong in this regard.

[95] In respect of the work types of General Clerk and Human Resources Clerk, an issue raised by Mr Macann and Ms Young is whether these jobs "exist". In this regard Dr Gribble has relied on the ANZSCO classification. While it may be the practice in the workplace to give these job types other descriptions, it is bordering on the absurd to say that the job types do not exist. The role of a clerk with or without further descriptive labelling is an enduring one.

[96] In relation to the Receptionist work type, Mr Macann and Ms Young challenged the relevance of the appellant's skills. They say she has no experience as such. However, experience in a particular work type is not a legal requirement. Rather, the legal test for vocational independence is whether the claimant is <u>suited</u> by reason of her experience, educational training to work at that work type (emphasis added).

[97] Furthermore, neither Dr Gribble nor Dr Antoniadis identified any environmental modifications that would be needed so that the appellant could do her work safely.

[98] As to income disparity, there is no requirement in the Act that a work type is only suitable if earnings in that work type are at least equivalent to the claimant's pre-incapacity earnings.

[99] Clause 25(1A) of the first schedule provides that when the occupational assessor is considering the suitability of a work type, the occupational assessor may

take into account, amongst other things, the claimant's earnings before incapacity. Accordingly, Mr Light is right to submit that pre-incapacity earnings is only one possible factor when considering the suitability of a work type.

[100] Plainly, since these provisions relate to reintegrating the injured person back into society as much as is practicable following injury, it would in the majority of cases be an almost impossible task to restore the claimant to their pre-injury earnings capacity following injury, particularly after serious or significant injury. And it is acknowledged that the appellant's injury in this case was significant. As I said in *Calzadilla*:[5]

> Prior earnings is a matter appropriate to take into account particularly when there will be a gross disparity between prior injury earnings and post injury earnings. However, it is but one of the factors to be considered as it will often be the case after injury, it will take time for the claimant to develop the experience and skills in what often is a new field of employment that would result in a remuneration level comparable to that prior to the accident, and of course in many cases on account of the severity of the accident, achieving earnings comparable to those prior to the accident will not be possible.

[101] Here, the surviving job types have as the upper limit of their remuneration range, annual salaries that at $50,000 are just below what the appellant was earning as a case manager for ACC.

[102] As to adjustments to the workplace to allow the appellant to work comfortably, firstly, none are identified in the assessment reports. However, should that prove necessary, they may well be the subject of an entitlement from ACC to the appellant.

[103] The Court is conscious of the fact that the assessments in issue on this appeal were carried out some six years ago.

[104] So, if the appellant's vocational independence has in fact deteriorated, then she is able to apply for a reassessment under s 109.

[105] It follows from the above that I find that the appellant has not established on the balance of probabilities that the respondent's decision of 7 March 2016

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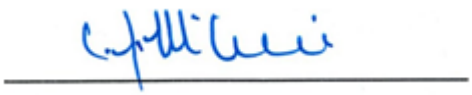
5 *Calzadilla v Accident Compensation Corporation* [2022] NZACC 7 at [94].

concluding that she had achieved vocational independence in four work types was wrong.

[106] I must therefore dismiss this appeal. There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Shine Lawyers NZ Limited, Christchurch for the respondent.